

FOR THE DISTRICT OF OREGON

OREGON ADVOCACY CENTER,
et al.,

Plaintiffs,

V.

BOBBY MINK, et al.,

Defendants.

JAROD BOWMAN, et al.,

Plaintiffs,

V.

DELORES MATTEUCCI, et al.,

Defendants.

LEGACY HEALTH SYSTEM, et al.,

Plaintiffs,

V.

PATRICK ALLEN,

Defendant .

Case No. 3:02-cv-00339-MO

Case No. 3:21-cv-01637-MO

Case No. 6:22-cv-01460-MO

March 31, 2023

Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES

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DISABILITY RIGHTS
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ALSO PRESENT:

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(P R O C E E D I N G S)

(March 31, 2023; 1:33 p.m.)

* * * * *

THE COURTROOM DEPUTY: We are here today for oral argument in Case No. 3:02-cv-339-MO, Oregon Advocacy Center, et al. versus Mink, et. al; member Case No. 3:21-cv-1637-MO; and 6:22-cv-1460-MO.

Counsel, please state your name for the record.

MS. COOPER: Good afternoon, Your Honor. My name is Emily Cooper, and I represent organizational plaintiff Disability Rights Oregon.

THE COURT: Thank you.

MS. SCOTT: Carla Scott for defendant.

MS. POTTER: Sheila Potter for defendants.

MR. GARZA: Keith Garza for Oregon amici circuit court judges.

MS. VETTO: And I'm Jane Vetto, here on behalf of Marion County, also nonparty Marion County Sheriff's Office.

THE COURT: Thank you all for being here.

Dr. Pinals, you're here listening by audio; is that right?

DR. PINALS: Yes, it is, Your Honor.

THE COURT: All right. Thank you.

Let me give my tentative thoughts -- and there's a lot of question in my mind about this, so feel free to jump in

1 and explain where I've missed something.

2 The parties are familiar with the underlying facts
3 that gave rise to this hearing today. The September 1 order
4 requires OSH to discharge people at certain time periods if
5 competency has not been restored and enough time has passed.

6 My own tentative view upon review particularly of
7 what the sheriffs have written is that the September 1 order
8 has a sort of a procedural or you might even think of as a
9 mechanical gap in it. It contemplates -- really the only thing
10 it says is that there will be a certain period of notice,
11 currently 30 days, soon I guess to be 60, and then that the
12 hospital is required to discharge the patient pursuant to this
13 order.

14 What it doesn't say anything about is who will come
15 get him or her and under what auspices. I'm confident that the
16 understanding of people involved to the point of me
17 promulgating this order was that law enforcement of some
18 kind -- typically a sheriff's office from the committing
19 county -- would come get the person and return them to the
20 county, and the county would then have to decide what to do
21 next. I appreciate -- I'm sure that's not always clear, but I
22 do very much appreciate that that leaves counties sometimes
23 with no great choices. But that's sort of the scheme that was
24 contemplated.

25 So we have now from Marion County certain people -- I

1 think we're down to three -- who are supposed to be discharged
2 pursuant to the September 1 order, probably supposed to be
3 picked up by Marion County Sheriff's Office and returned to
4 Marion County, and that's not happening. And it's not
5 happening for a variety of reasons, including the possibility
6 that Marion County Sheriff's Office would get in serious
7 trouble with their own courts and judges if they were to do
8 that, and also the possibility raised currently informally that
9 the director of OSH would be in trouble with Marion County
10 judges if discharge occurred, although I don't foresee a
11 situation where discharge would occur if nobody was there to
12 pick somebody up, since they arrive at OSH in custody.

13 The relief sought, if I understand it correctly, is
14 sort of two-fold: a restraining order requiring Marion County
15 Sheriff, nonparties, to come and receive the three people to be
16 discharged and return them to the committing county, Marion
17 County, and some idea, perhaps, that if that fails, that there
18 would be contempt of court for not doing so.

19 The gap that I think I see in the order is that it
20 doesn't really tell anybody -- it doesn't tell any sheriff's
21 office, for example, that they must come get a person about to
22 be discharged or really spell out in any way what is supposed
23 to happen next. And so that leaves me with the tentative view
24 that before I can really restrain a nonparty, it ought to be
25 clearer that the order requires the person, the entity to do

1 what I'm about to order them to do, as opposed to being silent
2 on the subject.

3 Again, so my tentative view is that the most that can
4 happen to advance the ball forward today for the implementation
5 of the September 1 order -- which I am committed to, despite
6 its sometimes painful consequences, because I believe it's
7 required by the Constitution -- the best I can do to advance
8 the ball towards its implementation is to amend the order to
9 make clear what currently isn't clear, and make clear that
10 about which it's currently silent as to what are the
11 responsibilities of the committing county upon discharge, amend
12 the order, and then start the clock running all over again.
13 That is, allow the amended order to do whatever it is it's next
14 going to do if I amend it -- that is, provide new notice and a
15 new opportunity to now comply with the more specific commands
16 of an amended order or not.

17 We may be right back where we are right now in the
18 future or may not -- I don't know the answer to that -- but my
19 belief is that because none of this is spelled out in my
20 September 1 order, that I'm not on solid footing to order
21 compliance absent an amended order that makes what must be
22 complied with clearer than the current version of the order
23 does.

24 So that's a sort of a long-winded explanation of my
25 tentative thoughts. I'll start with you, Ms. Cooper.

1 MS. COOPER: Your Honor, respectfully, plaintiffs
2 don't believe there's a mechanical gap. If you look at the
3 county briefing on page 4, they cite to a state statute 206.010
4 subsection 3. And that is a state statute that requires county
5 sheriffs to execute orders of the courts of justice or of
6 judicial officers, which includes this Court. And if you look
7 at Lieutenant Ramsey's testimony in his declaration, the Marion
8 County Sheriff's Office did get notice of this Court's
9 September 2022 order, and indeed the county sheriffs -- and I'm
10 quoting -- "incorporated these shortened timelines into their
11 tracking sheets," and have transported 56 individuals from
12 Oregon State Hospital, end quote, again pursuant to this
13 September 2022 order.

14 The county sheriff's office stopped complying with
15 this order only when a Marion County court issued a modified
16 order prohibiting transport. And again quoting from Lieutenant
17 Ramsey, "MCSO could not conduct transport without being in
18 contempt of state court."

19 And so it was only through the threat of contempt
20 that this county sheriff was put in a bind. Do we continue to
21 comply with this Court's order or the committing court's? And
22 so I think while we can all appreciate that the sheriff's
23 office was put into a very awkward position of choosing between
24 compliance with this Court's order and the committing court,
25 what is concerning is that it is still county courts that are

1 challenging this Court's authority to issue remedial actions to
2 comply with your very clear order requiring timely transport.

3 THE COURT: 206.010 does, in fact, require compliance
4 with court orders, including federal court orders. I guess my
5 fundamental question is where does -- and I can appreciate how
6 this worked across a number of cases prior to MCSO being at
7 risk of being in violation of a state court's order. It worked
8 prior to that on this sort of understanding that we all had
9 about what would make sense to happen next.

10 What I'm asking, I guess, is where does one go in the
11 September 1 order to find that this Court is ordering the
12 sheriff's office to come pick up people upon discharge?

13 MS. COOPER: Your Honor, if I may, I can point you
14 directly to where in your September order.

15 THE COURT: I can help you. The only possibility is
16 paragraph (3)d.

17 MS. COOPER: Yes, Your Honor, I agree.

18 And, again, the county sheriffs acknowledged the
19 limitations imposed by them and they included that in their
20 transport orders.

21 THE COURT: I don't mean to quibble with your point,
22 which is a good one. It's just that people sometimes have an
23 understanding of something until they don't. But if pressed,
24 as opposed to just adopting it as a matter of practice, if
25 pressed -- and that's what this hearing would be about -- my

1 question would be if you want me to -- well, let's start with
2 contempt, although we're not quite there yet, but let's start
3 with contempt. If you want me to hold somebody in contempt for
4 failing to obey an order of mine, then I've got to find in my
5 order where Multnomah County Sheriff's Office, for example, is
6 failing to obey an order of mine, and I struggle to see that in
7 paragraph (3)d.

8 MS. COOPER: So what I'm looking at --

9 THE COURT: What are they doing that fails to obey
10 anything in the September 1 order?

11 MS. COOPER: It's the language in your order, Your
12 Honor, that says, "No later than March 15, 2023, patients
13 currently admitted at Oregon State Hospital who have exceeded
14 the length of restoration set forth in this order shall be
15 discharged from their restoration and from the hospital."

16 Now, Your Honor, I understand what you're saying,
17 that there's no language about the obligation for the county
18 sheriff to transport. This is where I go back to state
19 statute. And the county in their own briefing acknowledged
20 that it's the sheriff's obligation to do so. So if you take
21 that language from your order and then the statute, we don't
22 believe again there's any mechanical gap.

23 THE COURT: Again, so I'm not trying to discount your
24 point, but I do want you for a moment to set aside what the
25 county did. That is, what they did was they read the

1 September 1 order and they understood it not just by way of
2 being nice, but under 206.010, they understood it to obligate
3 them to show up and pick up people from OSH and bring them back
4 to Marion County.

5 But if we set that to one side, that then
6 understanding of what they were obligated to do, and just
7 looked at what, in fact, in my order makes them do that, then I
8 guess from what you've told me, you've read (3)d. now and
9 (3)f., what you've told me is that there isn't anything textual
10 in the order that commands MCSO to come get these folks, right?

11 MS. COOPER: That's correct.

12 THE COURT: It's implicit, I guess, in the structure
13 of the entire order?

14 MS. COOPER: Yes, Your Honor, coupled with state
15 statute.

16 THE COURT: Coupled with state statute. All the
17 state statute does is say if federal courts order you to do
18 something, you have to do it. But I'm not asking that
19 question. I'm asking have I, in fact, ordered them to do it.
20 And your answer is not textual. Your answer is, well, everyone
21 thought you had and understood it that way until they were
22 threatened otherwise. Right?

23 MS. COOPER: That's correct. I think the sheriff's
24 office was put in a bind. Which court do I comply with?

25 THE COURT: All right. I kept you engaged while you

1 were handed a note. Is there something you want to add?

2 MS. COOPER: No. The note is simply that I think we
3 would take your direction if you feel like more clarity is
4 needed and more notice would put all parties on clear notice
5 that your injunction requires timely transport by the entities
6 responsible for providing transport.

7 THE COURT: Thank you.

8 Ms. Scott, Ms. Potter, anything you wish to add to
9 this discussion?

10 MS. SCOTT: Just briefly, Your Honor. I think that
11 filling in the gap would be helpful for all parties, just an
12 order as you just described to the sheriff's office. It is the
13 practice that is followed in all discharges for aid-and-assist
14 patients.

15 I did want to correct a fact. There are only two
16 remaining patients at the hospital whose time is up who can't
17 be discharged because of the sheriffs declining to transport
18 them, but we are having down the pipeline numerous new orders
19 from Marion County ordering that committed aid-and-assist
20 patients shall only return to the jail upon court order that
21 defendant is able or never able to aid and assist. So this is
22 an ongoing problem. I do think a gap-filling order making
23 clear what the responsibilities are would be helpful. The
24 hospital here just wants to comply with this Court's order and
25 the state court orders, and knowing that it must first comply

1 under the Supremacy Clause with this Court's order.

2 THE COURT: This is sort of in weeds on state law,
3 though. That's something I'm not familiar with to the degree I
4 need to be. So I have assumed -- I think we all did -- that it
5 would typically be in this setting. If anyone was to come pick
6 up a discharged patient under (3)d., it would be the county
7 sheriff's office.

8 MS. SCOTT: That's correct.

9 THE COURT: Is that set in stone or could it be other
10 possibilities?

11 MS. SCOTT: It's my understanding that there are not
12 other possibilities. I know in the briefing it was suggested
13 that potentially the Oregon State Police might be able to do
14 the transport, but Oregon statutes do not give OSP the
15 authority to transport patients from the State Hospital. Their
16 statutory authority is very limited. I would be happy to
17 provide the Court with further briefing, but currently Oregon
18 law does not allow OSP to transport the aid-and-assist
19 patients.

20 THE COURT: If the investigating agency for the
21 underlying offense is, say, Salem Police Department, does that
22 mean that Salem Police Department could go pick up someone
23 committed to OSH and return them to Marion County or not?

24 MS. SCOTT: We haven't looked at that particular
25 question, but I would be happy to provide supplemental briefing

1 at some point.

2 THE COURT: Thank you.

3 MS. POTTER: I think we would potentially be in a
4 situation in which the Marion County Sheriff's Office would
5 still have been ordered not to accept someone back into the
6 jail, which they also control. And I don't know that, but --

7 THE COURT: Because they do have sole control over
8 the jail, right?

9 MS. POTTER: I believe that's correct.

10 THE COURT: Compared to Oregon State Police or Salem
11 PD?

12 MS. POTTER: Yes.

13 THE COURT: All right. So that's a big part of why
14 it has typically been the county, because they're returning to
15 a county facility run by the sheriff's office.

16 MS. POTTER: Right.

17 THE COURT: Thank you.

18 Ms. Vetto, I'll start with you.

19 MS. VETTO: Thank you, Your Honor.

20 THE COURT: Is your microphone on?

21 MS. VETTO: Would it be easier --

22 THE COURT: That's fine. Just pull it closer
23 perhaps.

24 MS. VETTO: I guess the first thing I just want to
25 comment on --

1 THE COURT: I'm sorry, I'm going to pause you there.
2 I hate to interrupt you.

3 MS. VETTO: Is this better?

4 THE COURT: Much better. Thank you.

5 MS. VETTO: First of all I want to say thank you for
6 giving us the opportunity to respond to this motion today. The
7 sheriff's office is very concerned about this -- the whole
8 county is -- and really opposes the relief that the plaintiffs
9 requested in their briefing.

10 I guess the first kind of question is for us, we are
11 nonparties to this case, and the order that you entered on
12 September 1st is directed specifically to the entities that the
13 attorneys here represent. And so as the Court noted, there is
14 nothing in here that talks about the sheriff's offices in
15 general, who transports, reports, anything like that. So in
16 the absence of that, the sheriff's office has to look at what
17 they are ordered to do. And in Oregon, when a circuit court
18 commits an adult in custody who needs to be -- receive
19 restoration services at the State Hospital, the circuit court
20 orders them under a form order that's prepared by the DOJ to
21 transport that individual to the hospital and then pick them
22 up. That is the only thing that they are legally required to
23 do. There is no state statute that requires transport by
24 counties, by county sheriffs -- nothing. The only thing that
25 requires them -- the only thing in the words of the plaintiffs,

1 that they're charged to do, the only thing that charges them is
2 this order that they're seeking to have you vacate.

3 THE COURT: So when you say "transport," under what
4 authority does MCSO transport prisoners from circuit court to
5 OSH in the first place?

6 MS. VETTO: Under the same committing order.

7 THE COURT: The committing order is what gives the
8 sheriff authority to transport from jail to OSH?

9 MS. VETTO: Exactly.

10 THE COURT: There was a time not very long ago,
11 right, where MCSO was under the understanding, at least --
12 perhaps you'll tell me that was mistaken, but it was under the
13 understanding, was it not, that this Court's September 1 order
14 required and therefore authorized MCSO to pick people up who
15 had been discharged and return them to Marion County, right?

16 MS. VETTO: So our --

17 THE COURT: First just tell me if that's right. Is
18 that right?

19 MS. VETTO: I can't speak for how they understood it.
20 My understanding of the order was that the treatment -- the
21 treatment guideline -- or the treatment times would be
22 shortened, and after the required timelines had -- treatment
23 times had been met, that those individuals would be discharged
24 and we would revert back to the circuit court order for
25 transport.

1 THE COURT: Let me ask it this way. There were a
2 number of people who under the September 1 order, particularly
3 paragraph (3)d. and (3)f., had maxed out their time and had
4 been by this Court ordered to be discharged whom MCSO went and
5 picked up, right, and returned them to the county?

6 MS. VETTO: They did. And I --

7 THE COURT: They didn't do that out of the kindness
8 of their hearts.

9 MS. VETTO: I believe they did that through a circuit
10 court order. I can check on that, but I believe they received
11 an order from the court to do that.

12 THE COURT: All right. And then when they both quit
13 receiving such orders and, in fact, were ordered not to, that
14 practice stopped?

15 MS. VETTO: So it hasn't stopped. You know, that's
16 the other kind of -- there are a couple of factual inaccuracies
17 in the declaration that the plaintiffs base this motion on.
18 One of them is that the Marion County Sheriff's Office has
19 stopped transporting. That is not the case. The most recent
20 transport from the jail was Monday. They keep doing it when
21 they're ordered to do it, but in --

22 THE COURT: You mean -- because we have to be
23 specific about what order is ordering them to do it, you mean
24 orders from the circuit court to go and bring people back?

25 MS. VETTO: Even more specifically than that. When

1 the original committing order hasn't been changed. In the two
2 circumstances that we're talking about here, the circuit court
3 went in and specifically amended the original committing order
4 to prohibit transfer by the sheriff's office until -- unless
5 they provided the Court with updated progress reports. And my
6 reading of this doesn't prohibit that either. So there's only
7 two instances that I'm aware of. There was a third instance
8 that Mr. Wehr talked about that was a little bit different. In
9 that case the district attorney filed an unopposed motion to
10 keep the adult in custody at the State Hospital. It was --

11 THE COURT: So I understand better, meaning unopposed
12 by the criminal defense attorney?

13 MS. VETTO: Exactly, Your Honor.

14 And immediately thereafter, the State -- the jail was
15 notified the Court had entered that motion or had approved that
16 motion, and then following that, right after that, they were
17 informed that this individual had been moved into community
18 restoration and then discharged from the State Hospital. So in
19 his declaration, Mr. Wehr says, well, Marion County isn't
20 picking up this first individual. He's not at the State
21 Hospital anymore.

22 There are two individuals --

23 THE COURT: Can I follow up just a minute on that
24 just so I understand better?

25 MS. VETTO: Yes.

1 THE COURT: So are you telling me that there are
2 returns -- that is, people being discharged from OSP being
3 returned to Marion County -- being conducted by MCSO pursuant
4 to commitment orders that also include authority from the
5 court, the circuit court, to return people?

6 MS. VETTO: Exactly.

7 THE COURT: And then only when those are amended is
8 there no transport?

9 MS. VETTO: Exactly.

10 THE COURT: And it's always that they -- is it
11 invariably the practice that the commitment order includes
12 authorization to return upon discharge unless it's amended
13 otherwise?

14 MS. VETTO: So the form order is attached to
15 Lieutenant Ramsey's declaration for the Court to review. That
16 is the standard language that -- for all these commitment
17 orders, and to my knowledge, it has only been changed twice.

18 THE COURT: So in terms of a contest, so to speak,
19 between a Supremacy Clause contest between an order from this
20 Court and a circuit court order, that has only arisen when the
21 circuit court amends its original commitment order to disallow
22 return?

23 MS. VETTO: Yes.

24 THE COURT: And that has been always upon motion of
25 the DA or sometimes sua sponte?

1 MS. VETTO: I do not know.

2 THE COURT: And those amendments -- I know the ones
3 in front of me you suggest have a certain aspect to them, but
4 do they invariably simply disallow returns until a progress
5 report is filed or are they different from each other?

6 MS. VETTO: On page 5 of our brief, we actually cite
7 to the amendment language. They're identical to both and they
8 say: "The defendant may not be returned from OSH absent an
9 order from the committing court. The committing court may
10 issue an order allowing transport upon receipt of a current
11 progress report, as contemplated by ORS 161.371, detailing the
12 defendant's fitness to proceed."

13 THE COURT: All right. Thank you.

14 Those are my questions. Anything else you want to
15 add?

16 MS. VETTO: I guess the only other thing I want to
17 talk about is -- and the plaintiffs raised this in their brief.
18 They said that we should be -- the Court should take this
19 action against a nonparty, should enter this really
20 extraordinary relief because the requirements of FR 65 have
21 been met. And I won't rehash my brief. We do not believe that
22 they have been met. We're clearly not a legal entity or
23 legally tied in any way to the State Hospital, and we're not in
24 active concert with them. In fact, I think what they're saying
25 is we haven't done anything. And there is federal case law

1 that says to meet the second prong of FRCP 65, mere inaction by
2 a nonparty doesn't meet that aiding and abetting statute. So I
3 don't think they've met the requirements under FRCP 65.

4 THE COURT: Is it your theory that it's impossible to
5 reach a point where MCSO could be enjoined to return because
6 simply not returning is always going to be inaction only?

7 MS. VETTO: I would say under these particular
8 circumstances, where we've been prohibited to take an action,
9 yes.

10 And I think the other thing is, Your Honor, even if
11 you were to find that the requirements of FRCP 65 have been
12 met, I think the Court is still required to fashion a remedy
13 that's the least intrusive possible. And in this particular
14 circumstance, there's a lot less intrusive things that can
15 happen besides putting our sheriff in between competing and
16 conflicting court orders. First of all, the State Hospital
17 could do these progress reports for these individuals and
18 notify the Court so that they could be safely placed either
19 back in the community or into our jail.

20 The second thing is that contrary to the State's
21 contention, there's absolutely no state law that requires us to
22 transport. The statutes are silent to it. So if they're
23 arguing that somehow we can do it, they can do it too. They
24 have an entire police force. They could also --

25 THE COURT: They have to transport them to a facility

1 managed by your client, right?

2 MS. VETTO: I don't think that's the issue. I think
3 we would have to accept them because they're still under a
4 pretrial detention -- order of detention.

5 THE COURT: Well, I want to be careful about this.
6 Are you saying that even today that could happen? That if by
7 some miracle, you know, we found another law enforcement agency
8 that would do the transport, are you saying that today, given
9 the nature of the amended commitment orders, if one of these
10 two people showed up being transported by the galactic law
11 enforcement agency, you would be obligated to place them in
12 your facility?

13 MS. VETTO: I think my client would be mad at me for
14 saying this, but I think that there's certainly an argument to
15 that, yeah.

16 THE COURT: Is it also your client's position that
17 that would not violate the amended commitment order to do so?

18 MS. VETTO: I don't think it would, although I don't
19 know if the Court would agree with that. I think that the -- I
20 think actually what the amended order says is that they shall
21 not discharge, but if they decide to discharge, then I think
22 there's nothing in there that says we can't accept a person
23 under pretrial. We just can't transport them.

24 I do think there's some other things that they can
25 do. They haven't exhausted --

1 THE COURT: Can I ask just a practice question then?

2 MS. VETTO: Yes.

3 THE COURT: Has it been invariably the practice
4 across years of time that when for any reason there's a
5 discharge of a patient from OSH who is under an existing
6 commitment order of any kind -- meaning commitment order or
7 just custody order -- that it's the sheriff's office who goes
8 and gets them from OSH?

9 MS. VETTO: I would say if they're picking them up
10 under this order, yes, unless there was --

11 THE COURT: Separate from this order, what if they're
12 just -- have competency restored? Who goes and gets them?

13 MS. VETTO: I did not look into that. I can.

14 I think the last thing that we haven't talked about,
15 that the State hasn't talked about is that they haven't -- the
16 plaintiffs have not exhausted their remedies under state law.
17 I mean, if they object to a state court order, they can move to
18 quash it. They can mandamus it. There are a lot of things
19 that are less intrusive that they can get to try to set this
20 aside that doesn't require this really extraordinary relief
21 against a nonparty that is really untenable, that puts that
22 party in a untenable situation.

23 So I guess we ask that you deny this motion, and that
24 if you do fashion relief, that it be the least intrusive
25 alternative available.

1 Thank you.

2 THE COURT: Thank you.

3 I just want to follow up on one last thought to make
4 sure again that I'm thinking about this in the right way.

5 When you say that they haven't exhausted their state
6 court remedies, what I'm asking is are you maintaining that
7 there literally is some sort of exhaustion requirement, or is
8 it just that failure to do that shows a failure to use less
9 intrusive means of accomplishing your goals?

10 MS. VETTO: I think the latter. I think maybe
11 "exhaust" was an overstatement, but they certainly haven't
12 explored them before coming to federal court.

13 THE COURT: All right. Thank you.

14 Mr. Garza.

15 MR. GARZA: Thank you, Your Honor. Just --

16 THE COURT: Same request. If you wouldn't mind
17 getting that microphone close.

18 MR. GARZA: Thank you, Your Honor.

19 I'm just here to answer any questions or concerns the
20 Court might have.

21 THE COURT: I feel like it's been helpful so far,
22 unless you have something you specifically want to add.

23 MR. GARZA: No.

24 THE COURT: Do you wish to respond in any way,
25 Ms. Cooper?

1 MS. COOPER: No, Your Honor.

2 THE COURT: It is my view that this gap in the order
3 disqualifies this case for the remedies sought. I feel like
4 it's not clear enough who had to do what when for me to find
5 anyone in contempt or me to order by restraining order anyone
6 to do something they clearly should have done and are not
7 doing. So I deny the requested relief for today.

8 I am ordering the parties, and if willing, the
9 litigants in front of me here today, to submit to the Court in
10 one week's time a proposed amendment to the September 1 order
11 that fills this gap, and it needs to fill the gap -- there are
12 three issues to sort out, not all of them susceptible to
13 solution by a mere textual amendment, but it's worth a shot.

14 One is, and that is that the order should say what it
15 now doesn't say, and that is that when the moment of truth
16 arrives that section (3)d. contemplates, then who is obligated
17 to do what next. And I think that's fairly simple with just
18 one big issue that I'm unable to sort out today that you can
19 either tell me you sort out or tell me you don't know the
20 answer to and I'll rule on it, and that is if we were certain
21 that the person who had to come to OSH and get a person being
22 discharged under (3)d. and return that person to the committing
23 county was the committing county's sheriff's office, then the
24 textual amendment I think is pretty simple to write. What's up
25 in the air is does it have to be the sheriff.

1 And that has -- there's two ways to answer that
2 question. One is by statutory authority, which may be silent
3 on the matter, and the other is pragmatically. That is, if
4 there's no one else that really can do it, or if it doesn't
5 make any sense at all for some, you know, strange law
6 enforcement agency to show up at this sheriff's jail with
7 somebody, then I'm willing to do the most pragmatic thing if
8 it's the only right answer. So that's one question: Who is
9 supposed to show up and do what in order to effectuate (3)d.
10 and (3)f.?

11 The second is also I think worth thinking about as a
12 textual amendment, but it's also just worth thinking about, and
13 that is what obligation, if any, should the September 1 order
14 place on OSH to meet the request, at least in this case, by
15 circuit court judges for a predischarge progress report.

16 And you know the argument. The argument is if you're
17 going to send this person back to us and we have choices to
18 make, choices that could include community care but might also
19 include involuntary commitment for dangerousness or something
20 like that, then we would like to know OSH's professional
21 opinion about where this person stands. So that's something to
22 think about, whether it gets folded into an amendment to the
23 order or not.

24 The third is not a textual amendment. It's just one
25 on which I'll appreciate your further input by briefing or

1 otherwise, and that is does the requirement to use the least
2 intrusive means possible impose some obligation in this very
3 situation to seek state court relief.

4 Actually, thinking this through out loud, one week
5 isn't sufficient time. How much time would be needed to both
6 propose textual amendments and supply any additional briefing
7 on the remaining issues?

8 I'll start with you, Ms. Cooper.

9 MS. COOPER: Your Honor, I feel that the first is
10 achievable in a week. I think regarding the other two, I think
11 in particular the -- what I'll call the care coordination
12 requirement, that is something the parties plan on addressing
13 at -- during mediation with Judge Beckerman, and I think it is
14 critical.

15 THE COURT: So put it past those two mediation dates?

16 MS. COOPER: Correct.

17 THE COURT: Into May or what?

18 MS. COOPER: We can confer, but I think into May
19 makes sense from plaintiff's position.

20 THE COURT: Do you agree?

21 MS. SCOTT: I do agree. But with respect to the
22 obligation to pursue state court remedies, I would just point
23 out that neither the hospital or plaintiffs are parties to
24 these nontransport orders, so I don't believe that there is a
25 vehicle to appeal those orders by either of the parties in the

1 main Bowman cases.

2 THE COURT: Then it will be easy to provide your
3 brief on this question.

4 MS. SCOTT: So we can do that quickly. That was my
5 point.

6 MS. POTTER: I think on the side of a week.

7 MS. SCOTT: The second point is to what extent can,
8 should, and would the hospital be able to provide progress
9 notes to the committing court. But we are seeing a whole slew
10 of new orders that don't require a progress report but simply
11 say -- in their original commitment orders that say, I'm
12 committing this person to the hospital. They may not return
13 until I, state court judge, finds they are able or unable. So
14 that is a new thing. It's not before the Court today, but it
15 is separate and apart from the requirement for a progress
16 report.

17 THE COURT: I understand that by not granting the
18 relief requested today, that will back people up. That's
19 unfortunate but, in my view, unavoidable at this time. So
20 we'll just work as quickly as possible to create a path forward
21 that doesn't allow this logjam.

22 I want to be clear. If I thought the order were
23 clearer, then I have no question in my mind -- in my mind about
24 the application of the Supremacy Clause here, none whatsoever.
25 And so it's just a question of how to do two things that I

1 think are missing. One is to make the order clearer about who
2 is obligated to do what; and two, to at least explore the
3 possibility that for this particular subpart of the relief
4 requested, I'm ordering the least intrusive means possible.
5 I've already made that finding on a more overarching basis, but
6 I think it has to be applied somewhat differently to this
7 particular issue. But other than that, you know, we've gone
8 down this road already, and I'm clear in my views of what the
9 Supremacy Clause means and doesn't mean with respect to
10 competing orders here.

11 For your two clients -- I'll talk to you, Mr. Garza,
12 first. Your clients' fundamental position has been that the
13 order should be vacated, and so I'm not sure your client is in
14 a position -- clients, I guess, in a position to participate
15 meaningfully in amending an order they wish to see vacated. Is
16 there any point to your participation?

17 MR. GARZA: Well, I don't want to get into what's
18 been going on in the mediation, but -- as Ms. Cooper
19 indicated --

20 THE COURT: I mean in this particular piece of the
21 mediation, just this issue for today's purposes.

22 MR. GARZA: Well, I think numbers two and three that
23 you indicated are matters that my clients would be interested
24 in participating in.

25 THE COURT: Same question, Ms. Vetto.

1 MS. VETTO: Yes, I think that's absolutely true.

2 THE COURT: All right.

3 MS. VETTO: I guess I would say that if there is some
4 criteria about a discharge progress report, I have a feeling
5 that's going to take away the whole first issue about
6 transport, because I don't think the courts will block the
7 transport at that point. So I feel like number two --

8 THE COURT: Well, apparently some of the orders don't
9 require a progress report. That's what Ms. Scott has just
10 indicated.

11 MS. VETTO: I do not know that. That is not before
12 the Court today and I don't have that information.

13 THE COURT: That's part of why I need this time,
14 because there's some important questions that, through no fault
15 of your own, none of you know the answer to yet. That's an
16 important point. That's a very different issue if all that's
17 being required, all is progress reports as opposed to just a
18 pure competing set of demands against your client.

19 What I said earlier about the Supremacy Clause means
20 for your client's purposes that there well may come a day,
21 perhaps, that your clients face competing orders -- I should
22 say irreconcilable orders. That's too bad. That's not a good
23 situation for your clients to be in, but the Supremacy Clause
24 does provide an answer that gives your client a clean path
25 forward.

1 MS. VETTO: And we appreciate the opportunity to
2 participate as amicus and to participate in the mediations next
3 week and the week after. I guess my question is, it was our
4 understanding that the mediations were geared toward proposals
5 for amending the order. Is this part of that or is this
6 separate from that?

7 THE COURT: I'll leave that to Judge Beckerman. I'm
8 not going to step on that at all. But I am requiring, whether
9 it's independent or folded into that, separate consideration by
10 the parties and entities represented here today of the narrow
11 issue that has been raised by Ms. Cooper's request.

12 MS. COOPER: Your Honor, if I may.

13 THE COURT: Yes.

14 MS. COOPER: I think your original proposal under the
15 first -- around the proposed language clarifying the obligation
16 to transport, plaintiffs remain open to providing that
17 documentation within a week. We think that's more than enough
18 time for the parties to meet and provide that clarity.

19 THE COURT: I think that's right. It's a much
20 easier -- I don't mean easier intellectually, but it's a much
21 quicker task to undertake than the rest, and it doesn't
22 require, for example, learning facts you don't currently know.

23 So one week to submit proposed textual amendments
24 that close the gap I've described, and then I'll set a date in
25 maybe -- when is the second mediation session scheduled for?

1 The 11th? So a couple weeks after that to finish up the rest
2 of what I've requested.

3 MS. COOPER: Yes, Your Honor. I would imagine by the
4 last week of April we will have an idea if the mediation has
5 been successful and language around what you've identified as
6 to textual change, and then three, briefing regarding whether
7 or not a writ of mandamus is an appropriate remedy for
8 plaintiffs.

9 THE COURT: Ms. Scheele, can you suggest a date?

10 THE COURTROOM DEPUTY: April 25th.

11 THE COURT: I'll receive briefing on that date, and
12 then I'll set a further hearing if necessary.

13 MS. SCOTT: Your Honor, I think also within one week
14 we can provide briefing on No. 3, which is whether or not the
15 parties should appeal the state court nontransport orders.

16 THE COURT: Wonderful. I'll look forward to reading
17 it.

18 Anything else, Ms. Cooper?

19 MS. COOPER: No, Your Honor. Thank you.

20 THE COURT: Ms. Scott?

21 MS. SCOTT: No, Your Honor. Thank you.

22 THE COURT: Ms. Potter?

23 MS. POTTER: No, Your Honor. Thank you.

24 THE COURT: Mr. Garza?

25 MR. GARZA: No.

1 THE COURT: Ms. Vetto?

2 MS. VETTO: No, Your Honor.

3 THE COURT: Thank you all for your assistance in this
4 matter today. We'll be in recess.

5 THE COURTROOM DEPUTY: All rise. Court is in recess.

6 (Proceedings concluded at 2:19 p.m.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

April 5, 2023

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

<p>DR. PINALS: [1] 3/22 MR. GARZA: [7] 3/15 23/15 23/18 23/23 28/17 28/22 31/25 MS. COOPER: [18] 3/9 7/1 8/13 8/17 9/8 9/11 10/11 10/14 10/23 11/2 24/1 26/9 26/16 26/18 30/12 30/14 31/3 31/19 MS. POTTER: [7] 3/14 13/3 13/9 13/12 13/16 27/6 31/23 MS. SCOTT: [10] 3/13 11/10 12/8 12/11 12/24 26/21 27/4 27/7 31/13 31/21 MS. VETTO: [36] THE COURT: [75] THE COURTROOM DEPUTY: [3] 3/4 31/10 32/5</p>	<p>9 97124 [1] 2/13 97201 [1] 2/10 97204 [1] 2/21 97205 [1] 2/5 97268 [1] 2/16</p>	<p>amending [2] 28/15 30/5 amendment [7] 19/7 24/10 24/13 24/24 25/12 25/22 25/24 amendments [3] 19/2 26/6 30/23 amends [1] 18/21 amici [2] 2/14 3/15 amicus [2] 2/11 30/2 another [1] 21/7 answer [9] 6/18 10/20 10/20 23/19 24/20 25/1 25/8 29/15 29/24 any [12] 5/20 5/22 9/22 19/23 22/4 22/6 23/19 23/24 25/5 25/13 26/6 28/16 anybody [1] 5/20 anymore [1] 17/21 anyone [3] 12/5 24/5 24/5 anything [8] 4/14 9/10 10/9 11/8 14/15 19/14 19/25 31/18 apart [1] 27/15 apparently [1] 29/8 appeal [2] 26/25 31/15 APPEARANCES [1] 2/2 application [1] 27/24 applied [1] 28/6 appreciate [6] 4/21 4/22 7/22 8/5 25/25 30/1 appropriate [1] 31/7 approved [1] 17/15 April [3] 31/4 31/10 33/9 April 25th [1] 31/10 are [34] arguing [1] 20/23 argument [5] 1/20 3/5 21/14 25/16 25/16 arisen [1] 18/20 around [2] 30/15 31/5 arrive [1] 5/12 arrives [1] 24/16 as [15] 4/8 6/1 6/10 8/24 8/24 11/12 14/13 19/11 25/11 27/20 27/20 28/18 29/17 30/2 31/5 aside [2] 9/24 22/20 ask [3] 16/1 22/1 22/23 asking [4] 8/10 10/18 10/19 23/6 aspect [1] 19/3 assist [4] 11/13 11/19 11/21 12/18 assistance [1] 32/3 assumed [1] 12/4 attached [1] 18/14 attorney [2] 17/9 17/12 attorneys [1] 14/13 audio [1] 3/20 auspices [1] 4/15 authority [7] 8/1 12/15 12/16 15/4 15/8 18/4 25/2 authorization [1] 18/12 authorized [1] 15/14 available [1] 22/25 Ave [1] 2/21 Avenue [1] 2/5 aware [1] 17/7 away [1] 29/5 awkward [1] 7/23</p>
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